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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Computer III Further Remand
Proceedings: Bell Operating
Company Provision of Enhanced
Services

CC Docket No. 95-20

COMMENTS OF THE
ASSOCIATION OF TELEMESSAGING SERVICES INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The Association of Telemessaging Services International supports the continuation of strong structural separation requirements for the Bell Operating Companies' enhanced services. Absent implementation of ONA as originally promised, including fundamental network unbundling, the Computer III non-structural safeguards are inadequate to prevent access discrimination and other competitive abuses by the BOCs against their enhanced service competitors. As found in the Georgia MemoryCall proceeding, the BOCs can still engage in discriminatory network design and deployment of new functionality to the disadvantage of independent voice messaging bureaus.

Continuation of structural separation requirements will help prevent not only access discrimination, but also the unhooking, slamming, and other joint marketing abuses involving the actual and potential customers of independent of voice messaging service bureaus in which the BOCs currently engage. These incidents rarely become the subject of formal complaint proceedings, but rather are often dismissed by the BOCs as mere mistakes. Structural separation will likewise improve the enforceability of the Commission's joint cost accounting rules, thus adding further protections against cross-subsidization of competitive services with ratepayer funds. At the same time, there has

been no convincing showing that the public will lose the benefit of any substantial economies or efficiencies. Accordingly, the Commission should ensure that the BOCs remain required to offer enhanced services such as voice messaging through a fully separated subsidiary.

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**COMMENTS OF THE
ASSOCIATION OF TELEMESSAGING SERVICES INTERNATIONAL, INC.**

The Association of Teleessaging Services International, Inc. ("ATSI"), respectfully submits its comments in the above-captioned proceeding.¹ Herein, the Commission seeks to develop a record concerning the need for continuation of structural separation requirements in light of the remand of its Computer III decisions by the United States Court of Appeals for the Ninth Circuit in California v. FCC.²

As discussed in further detail below, serious questions have been raised by the Ninth Circuit about the actual and potential effectiveness of the non-structural Computer III safeguards in the absence of fundamental network unbundling. On remand, the FCC is charged with the responsibility for conducting a new cost-benefit analysis addressing the removal of structural separation requirements and explaining how continued structural relief could be in the public interest

¹ Notice of Proposed Rulemaking, FCC 95-48 (released February 21, 1995) ("NPRM").

² California v. FCC, 39 F.3d 919 (9th Cir. 1994).

given the manifest deficiencies in open network architecture ("ONA"). Because those shortcomings post serious risks of anticompetitive abuse for ATSI members, the Association strongly urges the Commission to maintain the Computer II requirement for full structural separation of the Bell Operating Companies' ("BOCs") basic and enhanced service operations.

I. STATEMENT OF INTEREST

ATSI is the national trade association for the telephone messaging industry. Its members provide a wide variety of services including live telephone answering services, automated voice storage and retrieval services and services that integrate operators and automated functions. There are approximately 3,000 telephone messaging service bureaus in the United States handling over one billion calls a year for more than 800,000 customers nationwide. But, the number of these businesses -- many of them small and headed by women -- has declined substantially since Bell Company entry into their markets.

Because ATSI's members remain utterly dependent upon the BOCs for essential services, facilities, and interconnection to the local exchange, the Association has been an active participant throughout the Computer III proceedings. ATSI has also taken a leading role in industry ONA efforts through

participation in the Information Industry Liaison Committee ("IILC"). Throughout, ATSI has expressed serious doubts that the FCC's non-structural safeguards could effectively prevent the BOCs from leveraging their monopoly control of the local exchange networks to impair competition in adjacent markets such as voice messaging services. The Ninth Circuit's decision and the experiences of ATSI's member companies have now confirmed that existing regulatory safeguards are wholly inadequate to that task.

II. BACKGROUND

In California v. FCC, the court found that the Commission had failed to rework its cost-benefit analysis for the removal of structural separation to take into account the agency's subsequent decision not to require fundamental network unbundling as part of its ONA policy.³ The Court explained that such fundamental unbundling had been an essential factor in the FCC's determination to remove structural separation requirements because it was the key to preventing access discrimination by the BOCs against their network-dependent competitors such as independent voice messaging service bureaus.⁴

³ 39 F.3d at 930.

⁴ Id. at 929-30;

The court noted that alternatives such as comparably efficient interconnection or "CEI" could not provide similar protections because "these safeguards do not enable enhanced service providers to pick and choose network service elements to design and develop enhanced services."⁵ Similarly, "network disclosure rules do not guarantee that the BOCs will provide competitors with the interconnection they need for their enhanced services."⁶ Accordingly, the court remanded to the FCC for a recalculation of its flawed cost-benefit analysis and an explanation of why structural separation could be lifted in the public interest notwithstanding that fundamental unbundling is currently unattainable.⁷

During the pendency of the Computer III proceedings, at least one state commission which had the opportunity to address similar safeguards issues reached decisions diametrically opposed to those of the FCC. For example, as noted by the Ninth Circuit, the Georgia Public Service Commission determined that BellSouth's unseparated offering of its MemoryCall voice messaging service in that state had led to widespread anticompetitive abuse.

The Georgia PSC found that the record demonstrated at least three significant instances of the discriminatory behavior by BellSouth. The Georgia

⁵ Id. at 929.

⁶ Id. at 929-30.

⁷ Id. at 930.

PSC found that: (1) because of technical barriers to independent enhanced service providers' use of the local networks, competitors could only provide a voice-messaging service that was significantly inferior to MemoryCall; (2) BellSouth had refused to allow competitors to co-locate their equipment in BellSouth's central offices, resulting in quality and price disadvantages for competitors; and (3) BellSouth had manipulated development of the local network, especially the timing of the unbundling of certain network features necessary for voice-messaging services, in order to maximize its competitive advantage for its initial offering of MemoryCall.⁸

The Ninth Circuit concluded that the "FCC has not explained adequately how its diluted version of ONA will prevent this behavior."⁹

The Georgia PSC went even further than the Ninth Circuit in questioning the Computer III safeguards. It concluded that the FCC's rules governing customer proprietary network information ("CPNI") conferred an unwarranted and anticompetitive advantage upon BOCs because of the double standard which permits a BOC to make use of a telephone subscriber's CPNI without prior consent.¹⁰ Indeed, the FCC itself has now concluded that those rules require reexamination notwithstanding the Ninth Circuit's

⁸ California v. FCC, 39 F.3d at 929.

⁹ Id.

¹⁰ Commission's Investigation into Southern Bell Telephone and Telegraph Company's Provision of MemoryCall Service, Order, Ga. PSC, Docket No. 4000-U at 37-38 (May 21, 1991).

determination that they are not, on their face, arbitrary and capricious.¹¹

III. ARGUMENT

A. Absent Fundamental Unbundling, Only Structural Separation Can Effectively Prevent Access Discrimination

The MemoryCall decision demonstrates that the existing CEI-based regulatory environment invites rather than prevents anticompetitive abuse against enhanced service providers such as voice messaging service operators. The problems of discriminatory network design and new service deployment are nowhere addressed by CEI requirements, network information reporting requirements, or the IILC process. For example, ATSI is aware of one instance in which the proprietor of a voice messaging business repeatedly requested the IILC to establish an ONA service element for a new network capability that, when ultimately implemented by the BOC serving that voice messaging system's service area, was not deployed in the telephone company offices serving his system. ATSI suspects that this pattern of strategic behavior is not uncommon, but that most affected subscribers either lack the knowledge or are too fearful of retaliation to bring their complaints to regulators.

¹¹ See FCC Public Notice, FCC 94-63 (Mar. 10, 1994).

In contrast, a structural separation requirement that prevented the personnel in a BOC's voice messaging operations from sharing their service and marketing plans with basic telephone service employees would render this type of discrimination vastly more difficult to accomplish. Such separation also would prevent BOC regulated personnel from "unhooking" customers of competing voice messaging providers who call in to order regulated services, signing up new residents and businesses for BOC voice messaging services before competing providers even know they exist, and engaging in other joint marketing abuses. At the same time, the public would not lose the benefit of any substantial efficiencies because (1) voice messaging service equipment is not typically integrated into local exchange network facilities, and (2) it is reasonable to assume that the BOCs have not overhired regulated personnel to the extent that they have significant time available to perform non-regulated tasks associated with the provision and marketing of voice-messaging services. Accordingly, ATSI urges the Commission to declare that the complete structural separation requirements initially adopted in the Computer II proceedings will continue to apply to the BOCs' provision of enhanced services.

B. Structural Separation Requirements Likewise Would Correct Serious CPNI Abuses

It merits the Commission's attention that reaffirmation of the Computer II structural separation requirements should also serve to prevent the types of CPNI abuses - - both authorized and unauthorized under the rules -- which the voice messaging industry is currently experiencing.

Separation of service and marketing personnel together with a requirement that BOCs not discriminate in their treatment of affiliated and unaffiliated voice messaging service providers will ensure that the affiliated providers no longer have preferential access to this valuable information. As noted above, it will also vastly improve the enforceability of the Commission's prohibitions against unhooking and slamming the customers of independent voice messaging service companies.

Notwithstanding such prohibitions, ATSI has been notified of numerous instances in which existing customers of its member companies have been solicited by their local BOC when they called in for a voice messaging-related service or because they were otherwise identifiable as voice messaging service customers.¹² Amazingly, in one case the owner of a telephone answering service bureau was switched from his own

¹² A number of these instances are described in an ex parte filing made by ATSI and referenced in the NPRM. NPRM at ¶ 38; Letter from Robert J. Butler, Wiley, Rein & Fielding, to William F. Caton, Acting Secretary, FCC, December 13, 1994.

company to the Southwestern Bell voice messaging service without his knowledge or consent. When such abuses are discovered, they are typically dismissed by the BOCs as "mistakes" and, thus, never appear in the complaint records of any federal or state agency. ATSI is concerned that such discoveries constitute only a small portion of the abuses now occurring in the marketplace. For these reasons as well, structural separation should be required.

C. Cross-Subsidization Concerns Also Support Structural Separation

Notwithstanding the Ninth Circuit's approval, the FCC's accounting rules are inadequate to protect against anticompetitive cross-subsidization from a BOC's monopoly services to its non-regulated offerings. First, the massive disparity in the BOCs' regulated and non-regulated revenues suggest that even the relatively insubstantial shifting of costs from non-regulated to regulated services could have a significant impact on the affected competitive market. Second, even if such cost shifting ultimately were discovered by the FCC, it would typically be many years after the adverse consequences for competition. Thus, while ratepayers may later be made whole, competing service providers typically would not.

Third, the FCC's accounting rules do not even address important sources of cross-subsidy such as the value of the

Bell Company name and the BOCs' preferential access to CPNI, which independent voice messaging service operators spend substantial sums to replicate because of its marketing value. Equally valuable is the BOCs' first sale opportunity, which they enjoy by virtue of their monopoly status and can exploit whenever a new resident subscribes to local telephone service or an existing customer calls in to change her basic service. The value of CPNI and the first sale opportunity are derived directly from ratepayers and the carriers' government franchise and should not, therefore, be simply transferred to a BOC's competitive operations without suitable compensation.

IV. CONCLUSION

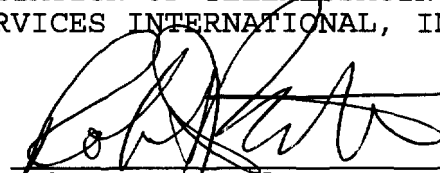
For the foregoing reasons, ATSI supports continuation of the Computer II structural separation regime for BOC provision of enhanced services. However, should the Commission determine not to require such complete structural separation, it should as a minimum amend the cost allocation rules to account for the information and other transfers discussed above and require separation of the BOCs' basic and

enhanced service operations with respect to service marketing
and use of CPNI.

Respectfully submitted,

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